Supreme Court, U.S.
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No. 01-1415

In the Supreme Court of the United States

FOUNDRY DIVISION OF ALCON INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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Petitioner Foundry Division of Alcon Industries, Inc. files this supplemental brief in support of its Petition for Writ of Certiorari to call attention to the applicability to this matter of this Court's decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, Case No. 00-1595, 122 S.Ct. 1275 (March 27, 2002).

As is fully detailed in Alcon's Petition, this case involves the interplay between the National Labor Relations Act ("NLRA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). The principle dispute between the parties concerns the extent to which the Board is required to take racial discrimination laws and standards into account in determining the outcome of a contested representation election.

Alcon has argued in its Petition that the Sixth Circuit and the Board completely failed to follow this Court's previous guidance that the Board must consider other statutory schemes in enforcing the NLRA. *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 46-47 (1942). Specifically, the Sixth Circuit and the Board determined the effect of racial epithets on employees in the polling area, with absolutely no reference to the standards for determining the effect of racial epithets that have been developed under Title VII.

This failure to consider the state of the law under Title VII has created two disparate bodies of law on the effect of the racial epithets in the workplace. The Sixth Circuit and the Board found the use of the word "nigger" when hurled toward African-Americans while waiting in line to vote had a lesser effect on African-Americans standing in line to vote, because the record reflected that African-American employees often use the word "nigger" toward one another. This

holding is directly contrary to the state of the law developed under Title VII, in which the effect of the frequent use of this horrid racial epithet is compounded, rather than diminished, by its repeated use.

In *Hoffman Plastic* this Court returned to the issue of the Board's obligation to consider other statutory schemes, that was first addressed in *Southern Steamship*. This Court refused to condone the Board's complete failure to even consider the tension between the Immigration Reform and Control Act of 1986 ("IRCA"), and the remedial provisions of the NLRA. The *Hoffman Plastic* Court held, "[t]he *Southern S.S. Co.* line of cases established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." *Hoffman Plastic*, at 9.

In so holding, this Court noted "we have accordingly never deferred to the Board's remedial preferences when such preferences potentially trench upon federal statutes and policies unrelated to the NLRA" and that an order by the Board that implicates federal statutes or policies administered by other federal agencies is "a 'most delicate area' in which the Board must 'be particularly careful in its choice of remedy.'" Id. at 5, 7-8 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962)).

In this case, as in *Hoffman Plastic*, the Board and the Sixth Circuit have completely ignored the tensions between the dictates of Title VII, that the frequent use of the term "nigger" alters the working conditions of employees, with the Board's interpretation of the NLRA, that the use of the same term in combination with a request for a vote while employees are waiting in line to vote is insufficient to alter the

"laboratory conditions" necessary for a free and fair representation election.

The *Hoffman Plastic* Court also rejected the Board's argument that the employer would get off "scot-free" if the Board did not have authority to award back pay to illegal immigrants in compensation for violations of the NLRA. *Hoffman Plastic*, at 14. This Court noted that there were other significant sanctions that were levied against Hoffman Plastic for their violation. *Id.* The Board, as affirmed by the Sixth Circuit, has made the same argument here, claiming that an employer could intentionally tolerate the use of racist language in an attempt to undermine an election. Any employer would be foolish to take such an approach, as the racist language could very well undermine an election result that is favorable to it, as well as subject the company to the full range of remedies available for racial harassment under Title VII. Further, it is the Board's responsibility to police the polling area to ensure that laboratory conditions are present. Pursuant to Board procedure neither the employer nor the Union is permitted in the polling area while ballots are being cast.

In sum, the *Hoffman Plastic* Court directed the Board to take into account other statutory schemes when fulfilling its responsibilities under the NLRA. Herein, the Board and the Sixth Circuit completely failed to consider the competing interests of Title VII. Petitioner respectfully requests that its Petition for Writ of Certiorari be granted and that the Sixth Circuit's decision be summarily vacated and remanded to the Sixth Circuit for reconsideration in light of this Court's *Hoffman Plastic* decision.

Respectfully submitted,

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